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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Appellee, v. ABRAAN RENE ORTIZ, Appellant.	2 CA-CR 2007-0375 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064581

Honorable Barbara C. Sattler, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Wanda K. Day
Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Abraan Ortiz was found guilty of possessing drug paraphernalia and possessing narcotic drugs for sale. He was sentenced to concurrent, enhanced, presumptive prison terms of 3.75 and 15.75 years.[1] On appeal, Ortiz challenges the trial court's denial of his motion to suppress evidence found in his car after police officers approached his vehicle. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "When reviewing a trial court's denial of a motion to suppress, we review only the evidence presented at the hearing on the motion to suppress, and we view it in the light most favorable to sustaining the trial court's ruling." *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007) (citation omitted).

¶3 One evening in November 2006, Tucson police officers Sutterley and Currier were patrolling an area "known for its high narcotics activity and trafficking in stolen vehicles" when they saw Ortiz's red Dodge Charger parked in front of a home. The car's lights were on, and two people were visible inside. On passing the vehicle a second time, Sutterley noticed that the car had a temporary license plate and that its lights had been turned off, although the people were still in the car. The officers decided the situation warranted further investigation because Dodge vehicles are "specifically targeted by auto thieves" who often print temporary license plates to disguise stolen cars. Sutterley approached the car and knocked on the window. Ortiz rolled down the window, and Sutterley immediately

[1]Ortiz was sentenced as a repeat offender with two or more prior felony convictions pursuant to A.R.S. § 13-604.

recognized "a strong odor of marijuana," which he reported to Currier. While Sutterly investigated Ortiz's driver's license and vehicle registration, Currier made contact with Ortiz and also smelled the marijuana odor. The officers then searched the car and, in a lunch box on the backseat, found cocaine and drug paraphernalia. They arrested Ortiz, who was convicted and sentenced as outlined above.

Discussion

¶4 Ortiz argues the trial court erred by not suppressing evidence collected after the police officers approached his car because they did not have reasonable suspicion to "approach[] and detain[]" him.[2] As the state correctly points out, however, police officers do not need reasonable suspicion to initiate a consensual encounter with a citizen. *See State v. Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d 392, 395 (App. 2000); *see also State v. Miller*, 112 Ariz. 95, 97, 537 P.2d 965, 967 (1975) (officers have "duty to be alert to suspicious circumstances and to investigate if necessary"). Ortiz contends this was not a consensual encounter and he was "seized" for purposes of the Fourth Amendment when the officers "pulled their police vehicles behind his car, put their bright spo[tl]ights on him, approached his driver's side door and knocked on the window." Whether an encounter is consensual is a mixed question of law and fact, *see State v. Box*, 205 Ariz. 492, ¶ 21, 73 P.3d 623, 629 (App. 2003), and the test is "whether, in light of all the circumstances, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about

[2]Ortiz only challenges the legality of the officers' approaching the car. He does not dispute that, once the car's window was open, the officers' actions were lawful based on what they observed.

his business.'" *Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d at 395, *quoting Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

¶5 Ortiz maintains he was not free to leave and thus was detained because "[m]ost people know that when a police officer stops their vehicle, they are supposed to stay in the vehicle. If a person starts to get out of the vehicle an officer will tell them to get back into the vehicle." But Ortiz mischaracterizes this encounter. As the undisputed facts show, he was not stopped by police but, rather, was in his parked vehicle at the side of the road when the officers approached him. We reject Ortiz's suggestion that the mere approach of a police car or police officers is tantamount to a "stop." *Cf. State v. Norman*, 835 P.2d 146, 149 (Or. Ct. App. 1992) (mere act of police car's following defendant does not constitute a stop).

¶6 Ortiz further contends that Officer Sutterly's knocking on the car window "[c]learly . . . communicated . . . that he must roll down the window and speak with [the officer]." A visual or verbal request to engage in conversation, however, is not a seizure. *See State v. Guillory*, 199 Ariz. 462, ¶¶ 8, 11, 18 P.3d 1261, 1264 (App. 2001) (officer's making eye contact and motioning to person was inviting, not demanding encounter); *Wyman*, 197 Ariz. 10, ¶ 8, 3 P.3d at 395 (defendant's initial encounter with officer consensual even though officer asked in "loud, forceful manner" to speak to defendant).

¶7 Ortiz also argues that A.R.S. § 28-622, which requires a driver to obey "lawful order[s] or direction[s] of a police officer . . . with authority to direct, control or regulate traffic" made the encounter nonconsensual because it would have been illegal for Ortiz not

to have complied with the officer's command to roll down his window.[3] In essence, he argues there can be no consensual encounter between a police officer and a citizen who happens to be in a vehicle. We have never so held, nor does our case law support this contention. *See, e.g., State v. Johnson*, 217 Ariz. 58, ¶¶ 22-23, 170 P.3d 667, 672 (App. 2007) (passenger in stopped vehicle engaged in consensual encounter with police), *cert. granted*, ___ U.S. ___, 128 S. Ct. 2961 (2008); *State v. Robles*, 171 Ariz. 441, 443, 831 P.2d 440, 442 (App. 1992) (consensual encounter when police approached driver who had voluntarily parked and emerged from vehicle).

Disposition

¶8 For the foregoing reasons, Ortiz's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

[3]In light of our conclusion that the initial encounter was consensual, we need not delineate the scope of § 28-622. However, Ortiz may be interpreting § 28-622 more broadly than its language supports by invoking the statute in this situation, to which it does not clearly apply. Here, police asked questions of persons sitting in a parked vehicle in front of a house; they were not engaged in "direct[ing], control[ling], or regulat[ing] traffic," and did not approach Ortiz for that purpose.